BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GENEVA WAITES
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-103
Case No. 70-3497

S.S.A. No.

ROBERTSHAW CONTROLS COMPANY
(Employer)

Employer Account No.

The employer appealed from Referee's Decision No. LB-27297 which held that the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's account is not relieved of charges under section 1032 of the code.

STATEMENT OF FACTS

The claimant was last employed by the employer as a rework girl. She was discharged February 26, 1970 under the following circumstances.

Because of a back injury which the claimant sustained in an automobile accident, it was necessary for her to obtain a medical leave of absence. She made inquiry as to the procedure and was advised to make a request in writing and substantiated by a doctor's certification. The claimant complied with these instructions and was granted a leave of absence from January 27, 1970 to and including February 22, 1970.

OVERRULED

The claimant was unable to return at the expiration of the initial leave of absence. Around February 16, 1970 she went to her doctor and requested that he furnish the employer further substantiation of her continued disability so as to extend her leave of absence. Her doctor informed her that he would take care of this matter and give the necessary certification to the employer. The claimant believed this took care of her obligation to the employer and took no further action by telephone or otherwise to check to see to it that the certification was sent by the doctor and received by the employer prior to February 22, 1970.

The doctor neglected to furnish the necessary certification of her continued disability and when the claimant had not returned to work by February 26, 1970 the employer discharged the claimant for failure to obtain an extension of her leave of absence and for being absent without notifying the employer for a period in excess of three days.

Provision is made in a collective bargaining agreement between the employer and the union for the procedure in obtaining a leave of absence and extensions thereof. A written application is required of the employee plus substantiation from a doctor. The claimant was not aware of the exact content of these provisions although she was given indoctrination at the time of hire regarding such procedures. The claimant testified that such indoctrination only lasted 40 minutes and she was not able to absorb and remember all the procedures.

Pertinent provisions of the collective bargaining agreement read as follows:

> ". . . Requests for extension /of a leave of absence/ must be presented to the Company in writing and supported by satisfactory evidence on or before the expiration date of the leave requiring extension." (Article XVII, Section 2)

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The quoted provision was added to the collective bargaining agreement because employees had failed to notify the employer if they would be returning to work at the end of a leave of absence. Under such circumstances the employer was at a loss to know whether additional people should be hired or not, and this interfered with the smooth and efficient operation of its business.

Appendix A of the collective bargaining agreement contains a list of actions which can form the basis for discharge. Item 6 in Appendix A reads as follows:

> "Absence from work for over three days without notifying the Company, or failure to return to work upon expiration of leave of absence."

When the claimant obtained her leave of absence effective January 27, 1970, she was told by the employer that "it would be necessary for her to make sure that the Drs request was mailed to us" and that "unless we received request she would be absent without authorization."

The employer's representative contended that the claimant had an obligation not only to see that her doctor furnished the necessary substantiation but was also to furnish a written application for an extension. The claimant was not aware that an application for an extension was necessary. Claimant's counsel argued that claimant's action was not in deliberate disregard of the employer's interest.

REASONS FOR DECISION

Section 1256 of the code provides that an individual is disqualified for benefits and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if the claimant has been discharged for misconduct connected with his most recent work.

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In approving the definition of "misconduct" stated by the court in Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 296 N.W. 636, the court in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947, held that the term "misconduct," as it appears in section 1256 of the code is limited to conduct which shows wilful or wanton disregard of the employer's interest, such as deliberate violations or disregard of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to show wrongful intent or evil design or intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, the court continued, mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not "misconduct." The court also held that the employer has the burden of establishing "misconduct" to protect its reserve account.

The term "misconduct" does not necessarily imply an evil or corrupt motive or an actual intent to injure or damage an employer's interests. It is sufficient if the act, or the failure to act, on the part of the employee be committed or omitted under such circumstances as would justify the reasonable inference that the employee should have known that injury or damage to his employer's interests was a probable result. (Appeals Board Decision No. P-R-15) Actual damage need not be shown by an employer to constitute "misconduct." A material breach of a substantial duty owed by an employee to his employer which tends to injure the employer's interest is sufficient to constitute "misconduct." (Appeals Board Decision No. P-B-77)

In Appeals Board Decision No. P-B-3 we found that there are four elements necessary to establish "misconduct":

(1) A material duty owed by the claimant to the employer under the contract of employment;

(2) A substantial breach of that duty;

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(3) A breach which is a wilful or wanton disregard of that duty;

(4) A disregard of the employer's interests which tends to injure the employer.

We find that the claimant was discharged for "misconduct" on two bases:

(1) Violation of the provisions of the collective bargaining agreement which tends to injure the employer's interest.

(2) Carelessness or negligence of such a degree as to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

There can be no question but that the above quoted provisions of the collective bargaining agreement the claimant violated are reasonable. They were agreed to by both the employer and the claimant's union. Also, the claimant knew or should have known the content of these provisions because of the indoctrination she received when she was hired. Additionally, the claimant was told when she obtained her leave of absence that it was her responsibility to see to it that the employer received medical substantiation of the need for a leave.

With the knowledge the claimant had or which was imputed to her, the claimant, under the facts of this case, owed a duty to the employer to request an extension of her leave of absence prior to February 22, 1970 and to see to it that the employer was supplied with medical substantiation for the need for such extension. The claimant breached this duty.

Under the above legal principles, a violation of a provision in a union contract by an employee is not, in itself, "misconduct." To constitute "misconduct," such a violation must breach a material duty owed by the employee to his employer under the contract of employment, which breach tends to injure the employer's interest.

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To run a business efficiently an employer requires a stable work force. One of the requirements of a stable work force is the predictability of who is going to be working. In times past employees did not always inform the employer if they were able to return to work at the expiration of a leave of absence. This upset the efficient operation of the employer's business. To alleviate this problem a provision was placed in the collective bargaining agreement to require employees to perfect an extension of a leave of absence if the situation required it. The evolution of such a requirement certainly created a substantial duty. Furthermore, a breach of this requirement would tend to injure the employer's interest since it could interfere with the efficient operation of the employer's business.

The claimant knew or should have known about the requirement regarding the perfecting of an extension of a leave of absence. She did not comply with this requirement. There was therefore a material breach of this requirement.

The claimant's failure to properly perfect the extension of her leave of absence was, therefore, a breach of a material duty owed by her to the employer and such breach tended to injure the employer's interest. Such inaction amounts to "misconduct."

Another basis for a finding of "misconduct" is that a reasonable person genuinely interested in preserving the employment relationship would not have acted as did the claimant.

The claimant knew that the employer required a medical substantiation of the need for the extension of her leave of absence. It follows that the claimant must have known that if the employer did not receive such a substantiation, the likelihood would be that she would lose her job. The only way that the claimant could ascertain if this requirement was satisfied would have been to in some way communicate with the employer prior to February 22, 1970. The claimant failed to do this. A reasonable person would have contacted the employer by telephone or in person to inquire whether the substantiation had been received and if so whether it was satisfactory, and if it had not been received.

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to then take effective action to accomplish the task. We find such inaction constitutes carelessness or negligence of such a degree as to show an intentional and substantial disregard of the employer's interests and of the duties and obligations owed by the claimant to the employer. Such inaction amounts to "misconduct."

DECISION

The decision of the referee is reversed. The claimant is disqualified for benefits under section 1256 of the code. The employer's reserve account is relieved of benefit charges under section 1032 of the code.

Sacramento, California, February 25, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

OVERRULED

DISSENTING OPINION

In the instant case the claimant was discharged by the employer for unreported absences for a period in excess of three days. The reason for the claimant's absences was such as to make the absences justifiable. However, the claimant was not discharged for the absences, but rather for her failure to notify her employer thereof. The question, therefore, is to determine whether the claimant's failure to notify her employer was an intentional disregard of her obligation to the employer or merely a good faith error in judgment.

The majority members of this board concluded that the claimant's failure to give notice was not a good faith error in judgment but rather a wilful omission on her part. Specifically, the majority states:

> "We find that the claimant was discharged for 'misconduct' on two bases:
>
> "(1) Violation of the provisions of the collective bargaining agreement which tends to injure the employer's interest.
>
> "(2) Carelessness or negligence of such a degree as to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer."

We emphatically reject the premises upon which this conclusion rests. Although the majority members state in their opinion that they recognize the legal principle that a violation of a provision in a union contract by an employee is not in itself misconduct, the import of the decision definitely enunciates the opposite theory, i.e., that a violation of a provision in a union contract by a claimant constitutes misconduct per se. This is obvious since our colleagues have so forcefully expounded that the claimant's omission constituted carelessness or negligence of such degree as to compel the conclusion that the claimant wilfully disregarded the

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employer's interests. If this conclusion rests on firm ground, we think it hardly necessary under these circumstances for the majority to consider whether or not the union agreement permitted a discharge for such absences unless it intended to convey that the claimant's violation of the union contract constituted misconduct per se. In our opinion, whether the discharge was warranted by the provisions of the union agreement is not the concern of this board. We are concerned here with whether or not the claimant's conduct was a wilful and deliberate violation of the standards of behavior which the employer had the right to expect of his employee.

To accept the majority decision in this case would in effect allow an employer and a union to determine the eligibility of a claimant for benefits by the provisions of their own collective bargaining agreement. As we stated in P-B-40:

> ". . . The legislature has not permitted the Department of Employment to delegate its authority to determine a claimant's eligibility for benefits. Therefore, we conclude that regardless of the desires of an employer or the terms of a union contract, when an unemployed individual files a claim for unemployment benefits, the Department of Employment must determine the individual's eligibility for benefits. . . ."

Now, turning to the merits of the majority's finding that the claimant's conduct was carelessness or negligence of such a degree as to show an intentional disregard of the employer's interest, we note with interest the following statement in the majority's reason for decision:

> "Another basis for a finding of 'misconduct' is that a <u>reasonable person</u> genuinely interested in preserving the employment relationship would not have acted as did the claimant." (emphasis added)

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We find this rhetoric slightly confusing considering the fact that the majority found that "the claimant was not aware that an application for an extension /of a leave of absence/ was necessary." However, we are particularly impressed with the majority's opinion as to what a reasonable man would do under the same or similar circumstances. The decision states:

> ". . . A reasonable person would have contacted the employer by telephone or in person to inquire whether the substantiation had been received and if so whether it was satisfactory, and if it had not been received, to then take effective action to accomplish the task. We find such inaction constitutes carelessness or negligence of such a degree as to show an intentional and substantial disregard of the employer's interests and of the duties and obligations owed by the claimant to the employer. Such inaction amounts to 'misconduct.'"

On the other hand, we note the referee's comment with respect to his opinion as to what a reasonable person would do under the circumstances. The referee stated:

> "In the instant case the evidence is clear that the claimant's doctor was remiss in failing to submit the necessary statement to the employer which he had promised to do. The referee believed that the claimant acted as a reasonable person in the conduct of human affairs in relying upon her doctor to act as he had promised. She was not mindful of all the procedures involved in obtaining an extension of her leave of absence. It was reasonable for her to presume that the first written application was all that was necessary and further substantiation by the doctor would affect an extension of her initial leave. The referee cannot find that the claimant deliberately disregarded the employer's interest in this case and concludes that the claimant was discharged for reasons other than misconduct under section 1256 of the code."

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We would comment that the phrase "reasonable person" probably was inspired by the standard of conduct concept involved in negligence cases in which the courts created a fictitious person who they described as a reasonable man or a prudent man, or a man of average prudence, or a man of ordinary sense using ordinary care and skill.

One writer had this to say about this mythical character known as a reasonable man:

> "'He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen. * * * He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; * * * who never mounts a moving omnibus and does not alight from any car while the train is in motion * * * and will inform himself of the history and habits of a dog before administering a caress; * * * who never drives his ball until those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbors, his servants, his ox, or his ass; * * * who never swears, gambles or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean.'"

Actually, this writer was ridiculing those cases developed in the common law which tried to exemplify the reasonable man as one without fault - a perfect man. Certainly for our purposes, we should not be looking for such a man. If the mythical character described above is the reasonable man, as the majority decision infers, it would appear that the court in the Maywood case was in error in holding that the claimant was not guilty of misconduct within the meaning of the statute.

LOWELL NELSON

DON BLEWETT

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